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No. 00-1457

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

v.

LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(i) Is certiorari appropriate to review a punitive damage award where the state appellate court expressly held under California law — after de novo review by the trial court — that the ratio of actual harm to punitive damages was only 4:1 *not* 340:1 and which does not involve any unsettled issues of Constitutional law?

(ii) Is certiorari appropriate to review a fact specific, non-published, opinion of a state intermediary court, on a case that affects only the instant litigants and presents no tangible conflict of law, in essence providing only an advisory opinion?

(iii) Is certiorari appropriate where the petitioner fails to provide the Court with a full and complete record of the evidence presented in the two trials, just as petitioner failed to do before the California Court of Appeal?

(iv) Whether Supreme Court review is appropriate where the evidence in two separate jury trials established fraud by clear and convincing evidence; that the fraud was committed with malice, oppression and fraud; that there was a repeated intricate practice of trickery, deceit and perjury; and where the state appellate court specifically found that the award did not violate due process considerations under the guidelines of this Court's decision in *BMW of North of America Inc. v. Gore*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings include respondent, LIONEL SIMON, doing business as LIBERTY PAPER COMPANY. Liberty Paper Company is a trade name for Lionel Simon.

STATEMENT PURSUANT TO RULE 29.6

Rule 29.6 is inapplicable, because respondent Lionel Simon is an individual.

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Plaintiff/Respondent LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY ("Simon") respectfully submits this brief in opposition to the petition for Writ of Certiorari filed by defendant and petitioner SAN PAOLO U.S. HOLDING COMPANY, INC. ("San Paolo"), in which it is seeking review of the California Court of Appeal's unpublished decision in *Simon v. San Paolo* case number B121917 (California Court of Appeal, August 28, 2000) and from the denial of the petition for review by the California Supreme Court, which denial was rendered en banc pursuant to case number S092092.

Appellate review followed two jury trials and corresponding motions for new trial, the first granted and the second denied, where the trial judge evaluated the evidence on a de novo standard pursuant to California Code of Civil Procedure § 657. *Tice v. Kaiser Co.*, 102 Cal. App. 2d 44, 46, 226 P.2d 624, 625 (1951).

After an express finding by the first jury that there was "clear and convincing" evidence of fraud, malice, and oppression, the second jury properly considered all of the evidence bearing on harm to Simon, which totaled over $400,000, and that he was unlawfully and fraudulently divested of his exclusive right to buy a unique office building that was needed for the future of his small printing and paper supply business. With consideration of the total harm, not just some bottom line number reflecting his out of pocket damages, the ratio of actual harm to punitive damages was just over 4 to 1. The Court of Appeal held that this was the correct ratio under California law and specifically rejected Petitioner's 340 to 1 concept. (Pet. A-31.)[1]

The evidence also demonstrated that San Paolo's senior officers were involved in the fraud by a "continuous and

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1. All references to "Pet." are to the Appendix attached to the Petition.

intricate" plan of trickery, deceit and perjury which was intentionally designed to deprive Simon of his exclusive right to complete the purchase of the building.

As stated herein, this case presents no authentic conflict of law, no unsettled question regarding due process and no new Constitutional issues for this Court to address. Since at least 1989, in *Gagnon v. Continental Casualty Company*, 211 Cal. App. 3d 1589, 1602, 260 Cal. Rptr. 305 (1989), California has been considering basically the same Constitutional safeguards that this Court ultimately adopted as "guideposts" in *BMW of North America v. Gore*, 517 U.S. 559 (1996). The state Court of Appeal adequately and thoroughly evaluated the entire record under the BMW guidelines — after de novo review by the trial court — and determined that there was no violation of due process.

Further, San Paolo has failed to demonstrate that California's procedures are in actual conflict with any other state or Federal Court. San Paolo has not offered any example of how the ruling in this state is problematic for any other litigant or tribunal. No examples are pointed out by San Paolo as to any genuine conflict. Simply repeating Constitutional buzzwords should not be enough to gain the privilege of Supreme Court review. Absent any real discernible conflict, this Petition is nothing more than an inappropriate request for an advisory opinion on previously settled areas of Constitutional law.

STATEMENT OF THE CASE

A. Statement of Factual Background

In the evening of June 12, 1996, after two days of detailed negotiations in which the parties intended to create a binding contract to sell the Property, San Paolo and Simon executed a "Letter of Intent" (the "Agreement") whereby Simon and

San Paolo agreed that all essential terms were agreed to and that the parties could then complete a sale of the Property. (Joint Appendix In Lieu of Clerk's Transcript "JA" 1864-1871.) Simon testified that he had waited patiently for almost *two* years to buy the Property and it was perfectly and *uniquely* suited for his business operations and it would generate rental income. (RT 31-34, 1229, 1231-1235; SJA 2424.) Simon was told by the broker that the Agreement was a binding contract and that it was the fastest way to get San Paolo into escrow because of the very short escrow period of about two weeks. (RT 69; SJA 2271-2273.) Contrary to San Paolo's claim, the Agreement did not contain any express statement that it was nonbinding. (SJA 2274-2281.) Simon testified and introduced evidence that the Letter of Intent was originally drafted with an express statement that it was binding but was later *surreptitiously* altered to remove the express statement. (RT 68-70; SJA 2271-2273.)

The Agreement stated it contained the "essential elements of this transaction and that any minor modifications or further instructions shall be identified and reflected in the escrow instructions." (SJA 2274-2281.) Paragraph M of the Agreement stated that "*Seller and Buyer agree to exclusively negotiate upon execution of this letter.*" (SJA 2280.) At trial, San Paolo's officers, Duane King ("King") and William Schack ("Schack"), admitted that they were bound by paragraph "M" and not permitted to negotiate with any buyer other than Simon during the "exclusive period." (RT 355, 486-487, 1434-1435, 1441-1443.) In addition, during the first trial, each party's expert witness, regarding Letters of Intent, testified that parties are bound by exclusive negotiation clauses. (RT 594-596; 804-805.) William Atha ("Atha"), the listing agent for San Paolo and the broker on the sale, acknowledged that the exclusive provision was to prevent the parties from negotiating with anyone else during the exclusive period and that Simon wanted the provision to ward off competing offers. (RT 240-241.)

In reliance on the Agreement and the promises contained therein, Simon hired Donald Mitchell, a lawyer, to whom he paid a nonrefundable retainer of $5,000, and began his efforts to close the transaction. (RT 82-82, 104-105; SJA 2350.) Simon also hired an inspection company and arranged for financing. (RT 93, 106-112; SJA 2293.) Simon testified he was ready, willing, able and eager to close the deal. (RT 65-67, 81-83, 88.) Atha, the broker, also agreed that Simon was committed to closing the transaction. (RT 217, 219 and 228.) Simon had all of the required documents ready to be delivered to King but King, through Atha, expressly told him that he would refuse any delivery. (RT 1252-1253, 1356, 1392-1393.)

The Agreement, as stated above, was agreed to and accepted by King in the evening of June 12, 1996. (RT 1867, 1871.) King was a vice president and specifically authorized to enter into agreements to sell property on behalf of San Paolo. (RT 399-400, 1425-1429.) In fact, both King and Schack, King's supervisor, were officers of San Paolo, with binding authority. King and Schack were authorized to execute in the name of the company all documents as may be required to sell real estate owned by the company. (RT 399-400, 1425-1427, 1428-1429, 1602-1608.) Further, Simon introduced evidence which established that neither officer was reprimanded for his conduct; instead, each received a bonus. (RT 1467, 1604, 1606, 1609, 1611-1612.)

The following morning, King unilaterally demanded that Simon shorten his due diligence period from the agreed date of the 26th to the 21st. Simon agreed to move the period to the 24th, which was only one business day from San Paolo's date of the 21st (a weekend intervened). When Simon demanded that escrow open, King turned the dispute against Simon by asserting that Simon was refusing to perform and thereafter at approximately 5:00 p.m. on the 13th, rather than continue to resolve this issue to complete the transaction as they were bound to do in good faith, King terminated the deal. (RT 1257-1258.)

At the time of these events, San Paolo's agent, Atha, wrote that San Paolo's position was unreasonable. (RT 1345-1347.) He stated as follows:

> [I]t seems that the bank's position of requiring funding no later than the 21st is unreasonable. Buyer has moved forward in "good and, better faith".

(RT 1346-1347.) The evidence established that San Paolo had no valid reason to insist that the deposit be released on the 21st, rather than on the 26th. For reasons which became clear later, King never even tried to get approval of the 24th.

Further, notwithstanding that escrow was to open only hours later, King and Schack conceded San Paolo never prepared any memoranda seeking approval of Simon's transaction from their New York office as they were required to do by the Agreement and as was their custom and practice. The approval documentation was called an "OREO Offer Sheet" and "Credit Memorandum." The evidence established that New York approval of the transaction in writing was never sought. (RT 397-398, 1455-1456, 1461-1462, 1605-1609 and 1614; SJA 2275.)

King's motivation for his unreasonable conduct was explained at trial. The evidence demonstrated that, during the exclusive negotiation period, San Paolo continued to negotiate the sale of Property with another buyer, 816 Partners, L.L.C. ("816 Partners") who were represented by Robert deVogelaere ("deVogelaere"), a broker and a managing member of 816 Partners. (RT 523-525, 534.)

The evidence demonstrated that San Paolo was obviously using Simon as a shill in order to get 816 Partners to the table with a better or firm offer. On June 12th, 816 Partners prepared a Standard Offer. On June 13th, it was signed by King on behalf of San Paolo. King signed it before he had even terminated

Simon's rights to be exclusively negotiating to buy the Property. (JA 1901-1916.) Thereafter, King began his renegotiation with Simon in order to discourage him from attempting to close the deal, and at approximately 5:00 p.m. on June 13, 1996, he terminated the Agreement. (RT 102, 364-367, 1254, 1263-1264, 1267-1268, 1344-1347, 1459-1461, 1616; SJA 2315-2316.)

After Simon filed suit on June 21, and recorded a lis pendens, San Paolo immediately filed a motion to expunge. San Paolo's counsel then drafted several declarations for use at the hearing. Concerned about the exclusive negotiation provision, both King's and deVogelaere's declaration admitted to the enforceability of the exclusivity provision but *fraudulently* stated that it was not violated.

deVogelaere's declaration stated that, because King *had advised* him that he was exclusively negotiating with Simon, they could not discuss the sale of the Property. deVogelaere stated, under oath, that he did not call King until June 14, after the deal was terminated. The declaration of deVogelaere also stated that his negotiations with San Paolo did not take place until the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.) As explained below, this declaration was intentionally false.

King's declaration stated that they neither met nor communicated with each other during the exclusive period. (RT 373-375, 464-465, 538-542, 1436-1438, 1512-1513, 1558-1559.) King stated that he first met with deVogelaere on June 14, 1996 when they signed their agreement. (*Ibid.*) The trial court relied on these false declarations and expunged the lis pendens. (RT 373-375, 464-465, 538-542, 1271-1272, 1435-1438, 1512-1513, 1558-1559.) As explained below, this declaration was also intentionally false.

At trial, San Paolo's scam began to unravel. Both King and deVogelaere conceded that their declarations were false.

Simon introduced both King's and deVogelaere's telephone records which documented a multitude of calls between deVogelaere and King immediately prior to the execution of Simon's Agreement and thirteen (13) telephone calls during the exclusive negotiation period. (RT 377-382, 464-465, 534-542, 568-569, 1435-1439, 1508-1509, 1511-1512, 1554-1555.) deVogelaere admitted that he was discussing the acquisition of the Property. (RT 508, 527, 534-542, 568-569, 1550, 1554-1555.) Further, San Paolo could not identify any other transactions being discussed with deVogelaere's company at this time. (RT 488-489, 1620.)

San Paolo also enlisted the assistance of the broker, Atha, to *conceal* King's repudiation of the exclusive negotiation clause. Atha's testimony and notes reflect that he was instructed by King, between 1:30 p.m. and 3:30 p.m., on June 13, 1996, during the exclusive negotiating period, not to advise Simon that King was violating his promise to exclusively negotiate. Atha wrote in his notes:

> Do not tell him — Lionel — that Duane is talking to any other deal in building —

(RT 242, 244-245, 1350, 1352; SJA 2353.)

deVogelaere further testified that his declaration was prepared by San Paolo's counsel after an interview with him. He gave them his best recollection at the time and then simply signed what they drafted without checking to see if they changed his story. (RT 542, 1558-1560.) deVogelaere further admitted, contrary to the declaration, that King never told him that he was bound to exclusively negotiate with Simon and, thus, continued to inquire about buying the Property. deVogelaere also admitted that the date of his meeting with King was falsely stated in his declaration; it took place on June 13, not in the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.)

During cross-examination, King reluctantly conceded that the statements in his declaration were false. (RT 377-382, 464-465, 1435-1438, 1508-1513.) At the first trial, King testified that he first saw the document during the evening of the *13th* at his home in Malibu where he and deVogelaere supposedly met after Simon's deal was terminated. (The declarations stated they first met in the late afternoon of the *14th*.) (SJA 2323-2330, 2331-2338.)

Although King claims he did not read or go over the proposed contract with deVogelaere that evening, he instructed deVogelaere to alter the date of the *offer* on the contract from June 12 to June 14; the date of acceptance was also altered from June 13 to June 14 (RT 383-386, 392, 529-533, 542, 1444-1446, 1448-1452, 1548-1549; SJA 2323-2330, 2331-2338.) The new dates were conveniently after the "exclusive negotiation" period had terminated. (RT 383-386, 392, 529-533, 542, 1444-1446, 1448-1452, 1548-1549; SJA 2323-2330, 2331-2338.)

Simon further impeached King by showing him the original contract with 816 Partners which suggested that he resigned it at a later time, not immediately as he testified. (A color photocopy was provided to the Court of Appeal as SJA 2408-2415.) An embarrassed King had to change his testimony again. Significantly, the form was originally filled out with an unusual bright purple pen by deVogelaere. (RT 1445-1446; SJA 2323-2330, 2331-2338.) King, however, signed and dated the document twice using two different color pens, one of which was deVogelaere's purple pen. The use of the two different pens suggested several possibilities, including one that he reviewed and signed the document at a later time when he used the second pen. Moreover, an examination of the original counterpart clearly showed that his original signature did in fact go all the way through, thus, contradicting one of his many excuses before and during the trial where he claimed it was resigned because he noticed it did not go through "so he

immediately" resigned and redated it. (SJA 2408-2415.) None of the possibilities conformed with King's several different explanations.

During the second trial, King tried to come up with a better explanation. King stated that he now recalled what had happened. King asserted he actually signed the purchase contract the second time in his car after arriving at deVogelaere's house, not at his dining room table. During recross, King was impeached with his deposition testimony, wherein he stated that he signed the purchase contract both times at his dining room table. He never mentioned in his deposition or at the first trial signing the document in his vehicle. (RT 1443-1452, 1485-1486, 1495-1497 and 1514-1518.) He even had a new excuse for the two pens, claiming that deVogelaere must have left one behind.

Further, the chronology of King's story on the morning of the 14th was not credible. King stated that after he signed the purchase contract at his home in Malibu, he left at approximately 8:00 a.m. to drop it off at deVogelaere's house in Pacific Palisades, California. He then placed the document in deVogelaere's mailbox, and drove to his office in a downtown Los Angeles high-rise where he parked his car in subterranean parking, took an elevator, and then made it up to his office in sufficient time to be logged onto the phone at 8:34 a.m., only 34 minutes later (based on the telephone records). (RT 383-387, 391, 1447-1453, 1456.)[2] Assuming he talked on the telephone first, King then, for the first time, prepared a detailed two page OREO Offer Sheet for this new sale which was then provided to his supervisor, Schack, who then prepared a detailed memorandum regarding the purchase transaction and transmitted it to New York, along with the OREO offer sheet,

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2. deVogelaere testified that it took him approximately 45 minutes to one and one half hours to travel by car from his home to King's office in downtown Los Angeles, let alone traveling from Malibu to the Palisades and then to downtown. (RT 527, 1546.)

all by 9:15 a.m. (based on the time stamps on the fax headers). (RT 383-387, 391, 495-496, 1447-1457, 1620-1623.) All of this took less than one hour and 15 minutes.

King, however, made another huge mistake. His computer had automatically dated the OREO Offer Sheet for June 13, 1996, thereby establishing when it was prepared (or worse, King typed the date himself).

Escrow records for the 816 Partners' sale were also introduced into evidence. These records revealed that "extra money" was placed into escrow, beyond the proceeds necessary for the actual sale. The only version of the escrow closing statement produced to Simon reflected that $69,248.38 was overpaid into escrow by the buyer's lender. (SJA 2351.) A letter to the escrow company, prepared by San Paolo's attorneys, discussed apparently a different version of the closing statement where as much as $95,000 was overpaid into escrow by the buyer. (RT 1462-1464.) No evidence was introduced to explain the reason why counsel wrote the letter or why the irregularity existed, except that the "extra money" supposedly went back to the buyer. deVogelaere, who at least initially received the money, testified that having the extra money in escrow was indeed "very uncommon." (RT 1586.)

San Paolo's tangled web of deception did not end, however, when 816 Partners entered escrow on June 14. Three days later, on Monday, June 17, 1996, King, fearing that Simon might file suit to block the sale, instructed Atha to renew their negotiations with Simon. Atha claimed that he did not know about the 816 Partners' sale so he dutifully complied. This instruction came three days after escrow for the sale to deVogelaere had opened! Atha was instructed to offer Simon $5,000 cash to induce Simon to perform his due diligence, and concede that the release date for the deposit would now be the 26th — six days after escrow was scheduled to close with 816 Partners.

(Interestingly, on the 13th, only four days earlier, the 26th was unequivocally unacceptable because there would not have been enough time to close by June 28, 1996. Now, with four less days, there would be.) Atha called Simon several times during that week, providing Simon with updates on King's efforts to get approval for their new deal from New York and Italy, where the parent company was located. San Paolo's transparent intent was to forestall Simon from filing suit, and blocking the sale of the Property, which was originally scheduled to close on June 20. (RT 227, 249-256, 1344-1346, 1353-1356, 1388-1389, 1392-1393; SJA 2323-2330.) Simon, now sensing that another sale was about to close, and that he was being defrauded, filed suit on June 21, 1996. He also recorded a lis pendens temporarily blocking the sale.

Simon testified that, as a result of the misconduct of San Paolo, he was deprived of this very unique five-story property that was specially situated and perfect for his business of selling paper products and printing to local offices. Simon testified he intended to use only a portion of the building to house his own business. The remainder would be leased to commercial tenants. (RT 31-33, 1229, 1231-1235.) The improvements to the upper floors were of high quality. The Property was unique in that it was the only five-story building that would ever be likely to come on the market in the financial district of downtown where the other office buildings are skyscrapers. Indeed, this was truly a once in a lifetime opportunity for a small businessman like Simon.

Simon's expert, David M. Rosenthal, MAI, testified that the market value of the Property was $1.5 million as of June 13, 1996. Simon's offer was for $1.1 million, thus reflecting a *lost profit of $400,000.* (RT 1678, 1703, 1710-1711, 1734; SJA 2274-2281.) San Paolo's appraiser, Mr. Charles Reinagal, stated that the market value of the Property, as of June 13, 1996, was only $1.0 million. However, Reinagal's opinion was substantially undermined by the discovery of a previous market

value appraisal that he did only six months earlier for San Paolo on the same property in connection with San Paolo's judicial foreclosure action which was eventually reported on appeal. *San Paolo U.S. Holding Company, Inc. v. 816 South Figueroa Company*, 62 Cal. App. 4th 1010, 73 Cal. Rptr. 2d 272 (1998). At that time, Reinagal testified that the market value was also $1.5 million. However, for this trial, Reinagal manipulated the evaluation process and dropped the price by 33%. Reinagal lowered the price based primarily on one new comparable, *i.e.*, the very sale to deVogelaere.

As to San Paolo's wealth, their financial statements demonstrated that the company had estimated net assets at liquidation value of approximately $50 million at the first trial. (SJA 2425-2436.) In November 1997, San Paolo transferred over $40 million to its parent company San Paolo Bank. This transfer occurred subsequent to when San Paolo was aware there would be a retrial of the amount of punitive damages. Mr. Wurster, a vice-president of San Paolo, conceded that at the time they made the transfer, they were aware that net worth was a factor to be considered by the jury in assessing punitive damages. (RT 1407-1412.) Further, San Paolo's forensic accounting expert witness Michael Kaplan, C.P.A., testified that prior to the transfer, San Paolo had a net worth at liquidation value of approximately $50 million. (RT 1402-1412; 1889-1893.)

B. Statement of Procedural Background

On June 21, 1996, Simon filed his complaint against San Paolo. The complaint included causes of action for False Promise, Breach of Contract, Specific Performance, and Breach of the Implied Covenant of Good Faith and Fair Dealing. (JA 1-18.) A lis pendens recorded against the Property was expunged on July 23, 1996. The only two causes of action which went to trial were the theories of False Promise and Breach of Contract. The first trial resulted in a verdict in favor of Simon on the claim for false promise, the jury finding that:

(1) San Paolo made a false promise about a material matter to Simon; (2) San Paolo did not intend to perform the promise at the time it was made; (3) San Paolo made the promise with an intent to defraud Simon; (4) At the time San Paolo made the promise, Simon was not aware of its intention not to perform; (5) Simon acted in reliance on the promise; (6) Simon was reasonably justified in relying on the promise; (7) San Paolo's promise caused Simon damage, and that such damage was $5,000; (8) That there was clear and convincing evidence that San Paolo committed malice, oppression or fraud in the conduct on which the jury based its finding of liability for false promise. (JA 615-617.)

The jury also decided that punitive damages should be assessed against San Paolo and determined this figure to be $2,500,000. (JA 618.) The jury found that there was not a binding and enforceable agreement between San Paolo and Simon. (JA 613.)

San Paolo filed its motions for a judgment notwithstanding the verdict and for a new trial, or, in the alternative, for a remittitur on August 21, 1997. (JA 619-776, 1050.) The trial court granted the motion for new trial unless Simon consented to a reduced damage award of $250,000. (JA 1228.) Simon rejected the remittitur and elected to proceed to a second trial. (JA 1269-1271.)

On March 9, 1998, the new trial went forward on the issue of the amount of punitive damages to be awarded. The *second jury to hear this case* returned a verdict of $1,700,000 in punitive damages against San Paolo. (JA 1817-1825.) After the conclusion of the second trial, San Paolo again filed a motion for new trial, or, alternatively for a remittitur, which the trial court denied. (JA 1518-1667; RT 1994-2003.) Under California law, on a motion for new trial, the trial judge conducts a an independent and de novo review of the evidence. (Cal. Code Civ. Proc. § 657.)

San Paolo's appeal, and Simon's protective cross-appeal followed this ruling. (JA 1829-1834, 1851-1853.) The Court of Appeal affirmed the award of punitive damages in an unpublished opinion which was filed on August 28, 2000. San Paolo filed a petition for rehearing which was denied by the Court of Appeal. San Paolo filed a petition for review to the California Supreme Court, which was denied en banc on December 13, 2000.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari arises from a fact specific determination after two trials, two de novo reviews of the matter by the trial judge after verdicts and separate reviews by the California Court of Appeal and California Supreme Court. The opinion of the California Court of Appeal is an unpublished decision. The purported issues presented raise no issues of national significance and seek to avoid clear pronouncements of California law.

I. CALIFORNIA LAW AND THE HANDLING OF THE PUNITIVE DAMAGE ISSUE IN THIS CASE SATISFY DUE PROCESS CONSIDERATIONS.

California law provides "fair notice" in setting forth the guidelines to determine whether punitive damages should be awarded and whether the award is reasonable. Consistent with this Court's recent decisions regarding due process considerations, California law properly restricts a jury's ability to render unfettered awards. California Civil Code §§ 3294 and 3295, California Book of Approved Jury Instructions, aka "BAJI," the independent post-trial review by the trial judge and appellate review based on a review of the entire record for "passion and prejudice" provide adequate constitutional safeguards against excessiveness.

Under California law, a plaintiff must overcome a full panoply of procedural protections before any punitive damage award is upheld. *See Haslip v. Pacific Mutual Ins. Co.*, 499 U.S. 1, 23 (1991). These protections include but are not limited to demurrers and motions to strike the pleadings on the basis that legally and factually a claim justifying punitive damages has not been pled. Cal. Code Civ. Proc. §§ 430.010 and 436. At trial, a plaintiff is not permitted to comment on or even inquire into a defendant's wealth and the punitive damage issues, until the trial court has been satisfied that a prima facie case has been established by the evidence. Cal. Civ. Code §§ 3294 and 3295. In most cases, and certainly in the subject case, the trial court bifurcates the punitive damage phase from the liability and compensatory damage phase. A plaintiff seeking punitive damages can only get to the second phase if the trier of fact finds by clear and convincing evidence that the conduct upon which the intentional tort has been committed was done through malice, fraud or oppression. Of course, there are also various other intermediary motions that are brought, as were brought in this case, including a motion for non-suit or directed verdict.

If the plaintiff overcomes these procedural hurdles, most of which are directed to the trial judge, then and only then is the plaintiff permitted to present the case for punitives to the jury. At that juncture, the court is required under California law to instruct the jury with an approved jury instruction, which advises the jury of the purpose of punitive damages and the various considerations that must be followed: reprehensibility of the conduct, the ratio of punitive damages to the injury, harm or damage to the plaintiff and that it should have a deterrent effect on the defendant in light of the defendant's financial condition.

If an award is actually rendered, it is promptly subject to the trial judge's independent de novo review. Thereafter, the judgment is often, as in this case, subject to appellate review in which a three judge panel reviews the entire record to determine,

inter alia, whether the award was the result of "passion and prejudice" and therefore excessive as a matter of law. The appellate court can also compare similar criminal penalties and fines. And, finally, the state Supreme Court has the discretion to review the decision.

Here, Simon's case has made it all the way through these procedural safeguards. In every forum, before every trier of fact, the conclusion has been the same after careful deliberation of the evidence, to wit: the amount of punitive damages awarded against San Paolo was appropriate given the reprehensibility of their conduct and their total contempt for the lawful process of the court, the potential and actual harm to Simon and others, and given their financial status. No other amount would have served the essential state interest which is to deter wrongful conduct and set an example for others. Indeed, the California Supreme Court denied review en banc.[3]

It is well settled that factors to be considered in evaluating the propriety of an award of punitive damages in California are the reprehensibility of the defendant's conduct, the relationship to the actual harm suffered by the plaintiff and whether the award will have a deterrent effect in light of the defendant's financial condition. *Gagnon v. Continental Casualty Company*, 211 Cal. App. 3d 1589, 1602, 260 Cal. Rptr. 305 (1989); *Moore v. American United Life Insurance Company* 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984). These factors are consistent with this Court's guideposts enunciated *BMW*, *supra*, 517 U.S. at 574.

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3. San Paolo devotes considerable space in their petition to a discussion of a concurring opinion of California Supreme Court Justice Janice Brown in *Lane v. Hughes Aircraft Co.*, 22 Cal. 4th 405, 421-22, 993 P.2d 388 (2000). It should not be overlooked that on the heals of issuing that decision and Justice Brown's concurring opinion, the California Supreme Court denied, en banc, any review of the instant case.

In *BMW*, *supra*, 517 U.S. 559, this Court confirmed that punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition. This Court in *BMW* sets forth the guidelines which are to be used in assessing whether the award comports with due process. These standards are the degree of reprehensibility of the conduct, the disparity between the harm or potential harm suffered and punitive damage award, and the difference between the award and the civil penalties authorized or imposed in similar cases. *Id.* at 575. California's approach is completely consistent with this Court's guideposts.

This Court previously upheld, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) an award of compensatory damages of $19,000, and punitive damages of $10,000,000, against a challenge that the award was so "grossly excessive" as to violate due process. *Id.* at 462. The Court held that the ratio of 526:1, between punitive damages and compensatory damages, was not so excessive as to justify reversal. *Id.*[4] The *BMW* decision also recognizes that no fixed ratio or mathematical formula determines reasonableness. *BMW*, *supra*, 517 U.S. at 585. California law is in accord.

Awarding punitive damages in fraud cases also furthers California public policy of punishing the defendant and making an example, in order to discourage the defendant and others from perpetrating fraud in the future. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1258, 1 Cal. Rptr. 2d 301; Cal. Civ. Code §3294, subd. (a). If the award exceeds the amount needed to accomplish that goal, an appellate court can infer that the jury acted out of passion and prejudice.

4. The analysis of the *TXO* decision contradicts reliance of San Paolo on the decision of *Federal Deposit Ins. Corp. v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) for the proposition that one of the factors court's are required to consider is whether the harm suffered is purely economic. Further, *Federal Deposit* stated that when the parties have a contractual relationship, they should protect themselves from harm in the contract. (*Ibid.*) That is not the situation in the present case.

(*Id.* at 1259.) When the award is grossly disproportionate to the statutory objective, a presumption arises that it resulted from passion and prejudice. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978). To make that determination the courts are guided by the three *Neal* factors which are identified above. *Id.* at 928.

Given these important safeguards against excessive awards, the facts of this case demonstrate that the award was clearly within Constitutional boundaries.

A. Actual Harm

In this case, based on clear California decisional precedent, the appellate court rejected San Paolo's attempt to restrict the harm considered by the jury in order to arbitrarily inflate the ratio to 340 to 1. After conducting its own independent review of the entire record, the appellate court held that the proper measure was the total harm suffered by Simon thereby establishing as a matter of law that the ratio is just over 4 to 1. (Pet. A-31) The evidence proved at trial that Simon lost the Property, which was worth $1.5 million, or $400,000 more than the agreed purchase price. The $1,700,000 award is approximately four times the actual harm sustained and approximately equivalent to the value of the Property. San Paolo ignores this evidence, arguing that the compensatory damages are only $5,000. San Paolo's argument is not based on any realistic assessment of what the second jury considered as the harm. They conveniently ignore that the second jury was not prohibited from considering all harm to Simon as a result of their conduct and that the ratio set forth in the jury instructions was not limited to only compensatory damages, *i.e.*, injury, *harm* or damage. *See* BAJI, 14.72.1 and 14.72.2.

Reported decisions in California have upheld awards of punitive damages where the ratios were 2,000 to 1, much higher than the present case. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d

910, 920, 148 Cal. Rptr. 389 (1978) [**74:1**]; *Finney v. Lockhart*, 35 Cal. 2d 161, 162, 165, 217 P.2d 19 (1950) [**2,000:1**]; *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1166, 74 Cal. Rptr. 2d 510 (1998) [**70:1**]; *Wetherbee v. United Ins. Co. of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) [**200:1**]. Thus, there is nothing per se inappropriate in this case about the ratio between punitive damages and the actual harm sustained.

Ordinarily, one who has been fraudulently induced to enter into an unenforceable contract may recover the benefit of the bargain, as well as out-of-pocket expenses. *Lazar v. Superior Court*, 12 Cal. 4th, 631, 638, 49 Cal. Rptr. 2d 377 (1996). However, a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the-bargain damages. (*Kenly v. Ukegawa*, 16 Cal. App. 4th 49, 54, 19 Cal. Rptr. 771 (1993); Cal. Civ. Code, § 3343.)

That does not mean that Simon did not suffer injury due to the loss of his bargain. Simon agreed to purchase the building for $1,100,000. His expert appraised the building's value as $1,500,000, as had San Paolo's expert before the action was filed. Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building.[5]

Although the compensatory damage award is usually a convenient measure of the injury or damages suffered by a

5. Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business, partly because it would enable him to compete better with the large suppliers like Staples, Office Depot, and Xerox. The building itself was also ideal, because it had a finished basement with a large, industrial-size freight elevator, which he found to be perfect for his warehouse. He planned to use the second floor, and lease out the top three floors, which had high quality improvements, making them attractive to potential tenants.

plaintiff, it may or may not reflect the **actual harm** the plaintiff has suffered. *BMW*, *supra*, 517 U.S. 559; *see also Gagnon v. Continental Casualty Co.*, 211 Cal. App. 3d 1598, 1603-04 (1989). "Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff . . . ." *Id.* at 1604; *Carr v. Progressive Casualty Ins. Co.*, 152 Cal. App. 3d 881, 892 (1984).[6]

Thus, although the judgment would be limited to an award of only $5,000 in compensatory damages, Simon was permitted to introduce evidence of actual harm sustained, *i.e.*, the differential between the sales price and the fair market value of the Property and the impact of the loss of this building on him, rather than merely the compensatory damages awarded by the first jury. Further, Simon introduced evidence that he was deprived of a building that was uniquely suited to his needs. Even if a monetary value is not placed on such a loss, it is evidence of actual harm which far exceeds in value the compensatory award.

B. Reprehensibility of Conduct of Defendant

San Paolo used Simon to ensure that deVogelaere would close the deal with San Paolo. This was for the apparent purpose of permitting King, and possibly others, to obtain some undisclosed monetary benefit, perhaps from the extra escrow funds. In closing arguments, San Paolo's counsel denied that

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6. Nor does the Due Process Clause of the Fourteenth Amendment require comparison with a fixed ratio based upon the compensatory-damage award. "It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO*, *supra*, 509 U.S. at 460; *BMW*, *supra*, 517 U.S. 559.

his client received a "bribe." (RT 1952-1954.) Simon's counsel never referred to it as a bribe, just unusual extra money.

San Paolo continued to mislead Simon about its willingness to sell Simon the Property in order to forestall interference by Simon with the close of the sale. When that failed, as a result of the prompt filing of this lawsuit and recordation of the lis pendens, San Paolo resorted to perjury. San Paolo filed false declarations of King and deVogelaere denying any communications during the period of exclusive negotiations in order to obtain an order expunging the lis pendens from the Property, thereby preventing Simon from ever obtaining the Property through his specific performance claim. That claim was rendered moot when Simon's Lis Pendens was expunged based on the false declarations and the Property was then sold to 816 Partners, L.L.C. The evidence in the case established that Simon would have purchased the Property if it were not for the fraud of San Paolo. San Paolo continued to subom perjury even throughout the second trial, never once apologizing for what its senior officers did to Simon, or attempt in any manner to offer an explanation as to the false declarations. In the second trial they continued with the same false testimony. The trial judge understood the impact of San Paolo's conduct:

> Let me tell you what I think happened. I think the jury considered Mr. King's conduct [San Paolo's officer] reprehensible . . . In fact, both juries did. And I have come to the conclusion after two jury trials that they thought King was lying . . .
>
> And the witnesses who supported King, I think that the jury believed they lied too. Lying is very powerful in the court if the jury believes that somebody lies.

(RT 1999.)

The appellate court agreed after a review of the whole record, that the evidence demonstrated not a single instance of misconduct as San Paolo would like to believe, but rather:

> King's deceit is not so easily dismissed as an isolated incident. It was continuous and intricate. After this action was filed, King **filed two false declarations**
>
> . . . .
>
> However, King's false testimony was more than litigation misconduct. It showed how he manipulated the parties and documents at the time of the events in mid-June 1996 in order to support his false claim that he complied with the terms of the letter of intent, and its claim that it was Simon who failed to perform. King's deception at trial showed how false he was prior to trial, and thus, how **reprehensible** his conduct was.

(Emphasis added.) (Pet. A-33-34.) Numerous cases hold that the more reprehensible the act, the greater the amount of punitive damages is justified. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978); *Moore v. American United Life Ins. Co.*, *supra*, at 637, 640; *Vallbona v. Springer*, 43 Cal. App. 4th 1525, 1536, 51 Cal. Rptr. 2d 311 (1996). Calculation of punitive damages "involves . . . a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendant." *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 390, 202 Cal. Rptr. 204 (1984). *Accord Walker v. Signal Companies, Inc.*, 84 Cal. App. 3d 982, 998, 149 Cal. Rptr. 119 (1978). In this case, San Paolo was caught cheating and lying. Thus, its conduct was considered despicable. San Paolo was appropriately punished for its unethical business practices. As Justice Kennedy aptly pointed out in his concurring opinion in TXO:

> . . . it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence. I confess to feeling a certain degree of disquiet in affirming this award, but the record, when viewed as a whole, makes it probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than a bias, passion, or prejudice. There was ample evidence of willful and malicious conduct by TXO in this case . . .

TXO, supra, 509 U.S. at 469.

Here, the evidence demonstrated a deliberate and calculated plan to defraud Simon and to prevent his acquisition of the building. Additional money was located in escrow and San Paolo tried in vain to deny it was a kickback or a bribe. San Paolo's senior officers falsified documents, lied i deposition and under oath at trial, not once — but on several occasions. They also filed declarations which were false and engaged in conduct that was considered in bad faith and unethical. Even after the entire scheme was disclosed by Simon, San Paolo continued to condone the conduct by moving to expunge Simon's lis pendens, thereby depriving Simon of a unique building in the heart of downtown Los Angeles, that he had closely followed and was led to believe he could buy for years while San Paolo completed its foreclosure. The senior officers guilty of this misconduct were not reprimanded or criticized but rather were given sizable bonuses for their "good" deeds.

C. Financial Condition

In order to accomplish the statutory goal of punishment and deterrence, a larger amount of punitive damages is

appropriate in the case of a wealthier defendant; the award must be large enough so that the defendant will not be able to absorb it without some discomfort. *Vallbona v. Springer*, 43 Cal. App. 4th 1525, 1539-41, 51 Cal. Rptr. 2d 311 (1996) (award of nearly 25% of defendant's net worth was not excessive). Here, the jury properly considered evidence of the current wealth of San Paolo and the $40 million in cash that it surreptitiously transferred to its parent — affiliate, San Paolo Bank. The jury appropriately considered the timing of the transfer as a further factor in determining the appropriate amount to award for the purpose of deterring San Paolo's future conduct. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) (Financial position of defendant is an appropriate factor for consideration.) (Cited with approval in *TXO, supra*, 509 U.S. at 462 & n.28 (plurality opinion); *Id.* at 469 (Kennedy, J. concurring in part and concurring in judgment); *Haslip*, 499 U.S. at 21-22; *Browning-Ferris Industries of VT., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part, dissenting in part).

D. Comparison to Criminal Fines and Other Sanctions

The final factor to be considered pursuant to *BMW* would be civil or criminal penalties for comparable misconduct. (*BMW v. Gore, supra*, at 1603.) This factor was appropriately addressed at the post award level. Here, perjury, as was proved at trial, calls for a sentence of two, three or four years, thus evidencing the serious nature of the misconduct involved. (Cal. Penal Code § 126.) Further, civil penalties for Unfair Competition, under California Business and Professions Code §§ 17200 and 17203, would include return of everything of value misappropriated by the wrongdoer. In this case, that would involve return of a property appraised at $1,500,000. Thus, criminal and civil penalties for San Paolo's misconduct are consistent with the award of punitive damages of $1,700,000.

III. SAN PAOLO'S ONE SIDED VERSION OF THE FACTS IS MISLEADING AND MAKES IT IMPOSSIBLE TO DETERMINE HOW OR IN WHAT MANNER THIS CASE RENDERS ANY LAW UNSETTLED OR OF NATIONAL IMPORTANCE.

The petition in this unremarkable appeal by the unsuccessful defendant in a real estate litigation matter does not assert any unsettled, important questions of law of national importance and does not present a necessity to secure uniformity of decision. Indeed, San Paolo makes no effort to demonstrate how this case affects any other tribunal deciding punitive damages or how the California state common law procedures for awarding punitive damages or evaluating them on appeal is inconsistent with another state.

San Paolo argues that a new standard of de novo appellate review should be established, yet fails to offer to this Court the complete factual record, as they failed to do in the state court of appeal. San Paolo's failure to provide the Court with the full record, justifies a denial because it demonstrates that San Paolo has artfully chosen which facts to discuss in an intentionally misleading way. Moreover, the State Court of Appeal did not consider San Paolo's current request to impose de novo review, although that is essentially what the appellate court did by reviewing the entire record. It appears that San Paolo's request is simply to create the appearance of "*Cooper*-like" qualities in order to gain this Court's attention. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035 (review granted.)

Thus, San Paolo has not adequately established compliance with any of the written considerations governing Supreme Court review as specified in Supreme Court Rule 10(b) or 10(c). These sections provide that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeal" and that "a state court . . . has decided an

important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." San Paolo has merely repeated constitutional buzzwords without substance. San Paolo fails to adequately describe or explain how or in what manner the conflict exists or how the state appellate court's decision conflicts with this Court's precedent. There is literally no showing of any practical and real significance to the alleged conflicts. Simon asserts that these hollow pronouncements by San Paolo justify a denial of review.

This is merely a case brought by a disgruntled litigant in a fact specific determination that affects only the litigants to this action. San Paolo's professed desire to settle important procedural issues of law is disingenuous. Indeed if, as San Paolo asserts, this Court's review of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, No. 99-2035, will address the issues raised by San Paolo, then this case is not necessary for that review or to assist the legal community. Furthermore, the instant case was twice reviewed on a de novo basis. The first time was on liability and damages. The second was solely on damages. Furthermore, the issue of a new or different form of de novo review on appeal was not addressed by or to the state appellate court. (*See, e.g., Illinois v. Gates* 462 U.S. 213 (1983) (State Courts should be given opportunity to substantively address the issue.)

The Petition raises issues adequately addressed in this Court's decision in *BMW, supra*, 517 U.S. 559. It offers nothing new, but merely the same issues as to the considerations required by states to comply with due process. San Paolo has not explained why that decision does not address the concerns raised in the Petition. San Paolo has not, and indeed cannot, show where additional judicial intervention is needed.

IV. SAN PAOLO'S CONSTITUTIONAL VAGUENESS ARGUMENT WAS REJECTED BY THE STATE APPELLATE COURT BECAUSE IT WAS INADEQUATELY RAISED AND IS NOT PROPERLY PRESERVED FOR SUPREME COURT REVIEW.

San Paolo's contention that California law is unconstitutionally vague (San Paolo's Reasons for Granting Petition "C") was inadequately raised at the appellate level as found by the California Court of Appeal. (Pet. A-17; 38-39.) The Court of Appeal rejected this argument finding it was not properly presented. As such it was not properly "passed upon" or "specially set up" for review. 11 U.S.C. § 1157. *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903) ("[T]he right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way"); *Webb v. Webb*, 451 U.S. 493, 495 (1981) (petitioner failed properly to raise or preserve claim in state courts).

San Paolo expresses the often used incantation by a losing party that a particular state standard is "Constitutionally vague"; however, San Paolo, as it did at the appellate level, makes no effort to address how or in what manner California law is vague. In *Neibel v. TransWorld Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997), it is stated that consistent with principles of due process, California Civil Code § 3294 provides "fair notice" that fraud can warrant an award of punitive damages. Numerous California decisions have also held that California Civil Code § 3294 is Constitutional. *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2, 185 Cal. Rptr. 654 (1982); *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1256-59, 1 Cal. Rptr. 2d 301 (1991). Thus, it is unlikely that California's statutory scheme for awarding punitive damages and all of the other procedural hurdles, outline above, can be considered constitutionally vague. It is specifically designed to provide fair notice to the litigant of the potential for an award.

V. THE OPINION SETS NO PRECEDENT AND AFFECTS ONLY SIMON AND SAN PAOLO.

The opinion by the California Court of Appeal has no precedential value and affects only Simon and San Paolo. The California Court of Appeal's Opinion was not published. Subject to limited exceptions (none of which is even arguably applicable here), unpublished opinions of a Court of Appeal cannot be cited or relied on by a court or a party in any other action or proceedings. Cal. Rules of Court, Rule 977(a).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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